91-505

No. 91-___

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM D. WEST,
Petitioner,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 1991

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54 pp

QUESTION PRESENTED

Did the court of appeals err in holding that federal regulations governing the overbooking of airline flights preempt state law claims for punitive damages even though (1) a federal statute and the regulations in question expressly preserve state law remedies, and (2) this Court has consistently refused to find preemption of state law punitive damages claims in similar situations?

PARTIES TO THE CASE

All parties to the case appear in the caption. American Airlines and Trans World Airlines sought leave to file briefs as *amici curiae* in the court of appeals in support of respondent Northwest Airlines' petition for rehearing and suggestion for rehearing *in banc*, but their motions were denied.

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PETITION FOR A WRIT OF CERTIORARI TO
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OPINIONS BELOW

The unpublished opinion and order of the United States District Court for the District of Montana appears in the appendix to this petition ("Pet. App.") at 25a-31a. The United States Court of Appeals for the Ninth Circuit issued two opinions in this case: The first opinion, which was withheld from publication pending a ruling on Northwest's rehearing petition, appears at Pet. App. 12a-20a. The second, which amended the first and is the subject of this petition, appears at Pet. App. 1a-11a and is reported at 923 F.2d 657 (1991). An order denying rehearing of that amended opinion appears at Pet. App. 21a, and the court of appeals' judgment appears at Pet. App. 22a.

JURISDICTION

The court of appeals' judgment was initially entered on 11 September 1990. Respondent's rehearing petition was granted in part, and an amended judgment was entered on 5 February 1991. Petitioner then filed a timely rehearing petition with the panel, which was denied on 4 June 1991 (Pet. App. 21a). By an order dated 21 August 1991 Justice O'Connor extended the time for filing this petition by 30 days to and including 3 October 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

Section 105(a)(1) of the Federal Aviation Act, as amended, 49 U.S.C. § 1305, states:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation.

Section 1106 of the Federal Aviation Act, as amended, 49 U.S.C. § 1506, states:

> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

The pertinent part of section 250.9 of Title 14 of the Code of Federal Regulations (1991), which deals with over-

booking of airline flights, appears below. The full text is set forth as Appendix H to this petition.

PASSENGER'S OPTIONS

> Acceptance [by an involuntarily bumped passenger] of the compensation [specified in this rule] may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

STATEMENT OF THE CASE

In October 1986 petitioner William D. West was involuntarily "bumped" from an oversold flight operated by respondent Northwest Airlines. Mr. West was travelling on a non-refundable fare which did not allow him any flexibility to change his travel plans. Between the day he made his reservation and the day of the flight, however, Northwest switched from a 727 to a smaller DC-9 on the route in question, thus increasing the odds that he would be bumped, but the airline did not alert Mr. West to this change. (Pet. App. 4a-5a).

When Mr. West arrived at the gate, the smaller aircraft was indeed oversold. Northwest offered him $198 in "denied boarding compensation," a form of liquidated damages which federal rules require an airline to offer involuntarily bumped passengers. 14 C.F.R. § 250.5. Mr. West rejected the offer, choosing instead to exercise an option specified in those regulations, *viz.*, pursuing remedies that are available under state law (Pet. App. 27a). *See* 14 C.F.R. § 250.9(b).

In May 1987 Mr. West filed suit against Northwest in Montana state court, and the case was removed to federal district court based on diversity of citizenship pursuant to 28 U.S.C. §§ 1332 and 1441. Mr. West alleged that his bumping was unfair discrimination under federal law and also that

Northwest had breached an implied covenant of good faith and fair dealing, in violation of Montana law (Pet. App. 5a).

Northwest moved for summary judgment, and the district court granted its motion. In a ruling not challenged on appeal, the court rejected Mr. West's federal anti-discrimination claim. The court expressed no view on the merits of his state law claim, however, finding that it was expressly preempted by section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), which preempts state laws "relating to rates, routes, or services." The court read this statute broadly, holding that Congress "intended to preempt all state statutes and common law rules which affect rates or services involving air travel" (Pet. App. 30a).

Mr. West appealed, and the Ninth Circuit reversed on 11 September 1990 (Pet. App. 12a-20a). The court of appeals rejected Northwest's express preemption claim, holding that section 105 "preempts claims only when the underlying statute or regulation itself relates to airline services" (Pet. App. 18a). Thus, state laws which single out airlines or transportation companies for special treatment are preempted, but not a generally applicable common law claim such as Mr. West's, which "simply imposes a duty on all persons entering into contracts to act with good faith and fair dealing" (Pet. App. 19a).

The Ninth Circuit also rejected Northwest's implied preemption claim, noting that section 105 co-exists with section 1106 of the Federal Aviation Act, 49 U.S.C. § 1506, which has been in effect since 1938 and which expressly preserves state common law and statutory remedies (Pet. App. 19a). The court also found no conflict preemption, noting that federal overbooking rules "specifically contemplate customers choosing between liquidated damages or state common law remedies" (Pet. App. 20a).

Northwest filed a rehearing petition, which the panel granted in part on 5 February 1991 in an amended opinion which affirmed in part and reversed in part (Pet. App. 1a-

11a). The amended opinion was identical to the earlier opinion insofar as it allowed Mr. West's claim for compensatory damages to proceed (Pet. App. 4a-10a). The court reversed itself, however, on an issue which had not been briefed or argued (even on rehearing). In a brief paragraph added at the end of the opinion, the court held that Mr. West's punitive damages claim was preempted because it conflicted with federal overbooking rules. The court stated that a punitive damages award would punish Northwest for engaging in overbooking, which the federal rules expressly allow (Pet. App. 10a).[1]

Mr. West filed a timely petition for panel rehearing of the amended opinion, noting that his punitive damages claim focused on Northwest's failure to provide adequate notice, not the act of overbooking. The panel denied his petition by an order dated 4 June 1991 (Pet. App. 21a).[2]

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND RAISES IMPORTANT ISSUES FOR REVIEW.

In holding that Mr. West could pursue his common law claim for compensatory damages, the Ninth Circuit read section 105 of the Federal Aviation Act as having a narrower

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[1] The opinion also noted that no judge had requested a vote on Northwest's suggestion of rehearing in banc (Pet. App. 3a).

[2] That order was ambiguously worded in that it also reversed the earlier decision to grant Northwest's rehearing petition, but failed to specify whether that meant that the punitive damages discussion was being vacated. A subsequent order made it clear that the punitive damages holding was not vacated (Pet. App. 23a).

preemptive effect than did the Fifth Circuit in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (1990), which held that section 105 preempts state laws seeking to regulate unfair competitive practices insofar as they apply to airlines. A certiorari petition seeking review in the Fifth Circuit case, based in part on these conflicting readings of section 105, is currently pending *sub nom. Morales v. Trans World Airlines, Inc.*, No. 90-1604.[3]

Because the Ninth Circuit's reading of section 105 favors Mr. West, he does not seek review of that ruling. Instead, this petition addresses only the ruling that Mr. West's claim for punitive damages is preempted, which should be reviewed because, as we now show, it conflicts with applicable decisions of this Court and raises important questions about the availability of federal and state remedies to airline passengers.

The Ninth Circuit's reasoning on punitive damages was as follows: "[F]ederal regulations contemplate overbooking as an acceptable practice so long as passengers receive compensation. Accordingly, any scheme that *punishes* the practice would be inconsistent with applicable federal law. West's claim for punitive damages is therefore preempted" by federal law. Pet. App. 10a (emphasis in original). This

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[3] Although the Ninth Circuit read section 105 more narrowly than did the Fifth Circuit, the decision below may still have a broader preemptive effect than Congress intended. The decision fails to recognize that many state law remedies treat airlines and other transportation companies differently than other industries because of their status as common carriers, and at least one court has read the express preemption analysis in the decision below as preempting such remedies. Abou-Jaoude v. British Airways, Inc., 228 Cal. App. 3d 1137, 281 Cal. Rptr. 150 (1991). That result appears to conflict with Congress's decision to preserve common law remedies for airline passengers, see 49 U.S.C. § 1506, reprinted at p. 2, supra, but it is not an issue presented by this petition because it does not affect Mr. West.

holding should be reviewed because it misreads federal law and conflicts with applicable decisions of this Court.

At the outset, the Ninth Circuit's reading of the overbooking rules is wrong because those rules do not guarantee that bumped passengers will "receive compensation" under state law. The rules merely gives them the *option* of pursuing any state law claims with no assurance of success on the merits. 14 C.F.R. § 250.9(b). Indeed, in the leading case of *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), the bumped passenger ended up recovering nothing on his common law claim. *See* 626 F.2d 1031 (D.C. Cir. 1980).[4]

The Ninth Circuit's preemption analysis is at odds with *Nader*, which drew a crucial distinction that was overlooked here. In *Nader*, the passenger sought to litigate a common law claim of fraudulent misrepresentation, which rested not on the theory that overbooking was unlawful *per se*, but on the fact that Allegheny failed to disclose its practice adequately. 426 U.S. at 295-96, 305-06. Had the plaintiff in *Nader* prevailed on a claim for compensatory or punitive damages, Allegheny would have been free to continue overbooking, but its method of disclosing that practice would be affected.

So too here, the focus of Mr. West's claim is not overbooking, but a lack of adequate notice and fair dealing by Northwest, when it shifted to a smaller aircraft on the affected route after Mr. West bought a non-refundable ticket and failed to advise him of this change, which significantly raised the odds that he would be bumped. Here, as in *Nader*, federal overbooking rules say nothing about an airline's obligations

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[4] Indeed, if federal overbooking rules really did impose a strict liability regime under which passengers must "receive compensation," regardless of whether they pursue a state or federal remedy, then the Ninth Circuit should have remanded this case with instructions to enter summary judgment against Northwest with respect to liability, leaving only the amount of Mr. West's actual damages to be determined.

in this situation, and so an award of punitive damages would not "punish" Northwest's decision to oversell its flights, but its failure to pick up the telephone and tell Mr. West of a material change affecting his reservation.

The decision below also conflicts with this Court's cases holding that punitive damages are not preempted under other, similar laws. The case which best illustrates this point is *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), where a worker at a federally-regulated nuclear facility was contaminated by radiation exposure. Her estate sought compensatory and punitive damages under state tort law and was met with arguments that punitive damages were preempted by federal laws that regulated nuclear safety and imposed civil penalties on companies which violate them.

This Court rejected these preemption claims while acknowledging a "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability." *Id.* at 256. The Court was not persuaded to find preemption based on the fact that a nuclear facility would have to pay civil penalties for violating federal standards as well as state-imposed punitive damages based on the same incident. Such a result "would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." *Id.* at 257. Since *Silkwood*, this Court has rejected similar claims that federal laws preempt state remedies governing the same conduct. *English v. General Electric Co.*, 110 S. Ct. 2270, 2279 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988).

If anything, the tension between state and federal law was much greater in *Silkwood* than it is here. The federal overbooking rule creates a federal remedy in the form of liquidated damages and gives bumped passengers a choice between that remedy and any state remedies. Thus here, unlike the situation in *Silkwood*, an airline cannot be liable

under both schemes for the same incident. Nor, as we explained above, would an airline's exposure to punitive damages in the current situation frustrate the policy decision embodied in the federal rule, namely, that overbooking is "an acceptable practice" (Pet. App. 10a). An award of punitive damages would punish not overbooking, but Northwest's failure to disclose changed circumstances to its customers who hold confirmed reservations and a non-refundable ticket on a flight.

The decision below also conflicts with *California v. ARC America Corp.*, 490 U.S. 93 (1989), where four states sued cement producers for pricefixing in violation of federal and state antitrust laws. The federal claim was barred under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which denied recovery to indirect purchasers such as the four states. This Court held, however, that federal law did not preempt state antitrust laws which allow indirect purchasers to recover treble or punitive damages if they prevail. *ARC America* thus allows state law claimants to obtain punitive damages under state law even if the conduct they challenge is sanctioned by federal law, and the Court rejected arguments that this result conflicts with the federal goals identified in *Illinois Brick*. *Id.* at 102-06. So too here, allowing Mr. West to pursue a state law claim for punitive damages does not interfere with Northwest's ability to oversell its flights or the operation of federal overbooking rules.

Apart from this line of cases, the Ninth Circuit's preemption analysis conflicts with *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), which refused to give preemptive effect to federal rules when no such intent was expressed by the agency, even though the rules were comprehensive in scope. Noting that agencies can deal with issues in a more detailed way than Congress, the Court stated: "[W]e can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption,

we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt." *Id.* at 718.

Here, the Ninth Circuit did not pause, but proceeded to leap (without briefing or argument) to a conclusion that federal overbooking rules preempt punitive damages claims. Its opinion cited no evidence that federal regulators ever intended these rules to have a preemptive intent, and we have uncovered none in the nearly 30 years that the Civil Aeronautics Board and Department of Transportation (which succeeded the Board in 1985) have been regulating this practice.

Finally, the question presented here is important enough to warrant review because it implicates not only the right of the states to provide remedies for their citizens, but also the policy choice made by the federal government to give bumped passengers full disclosure of their rights and their options in that situation.

Federal overbooking rules place a premium on disclosure. Airlines are required to tell passengers that they must solicit volunteers before anyone is involuntarily bumped, they must inform potential volunteers about their options, and they must advise involuntarily bumped passengers of their choice between accepting the liquidated damages specified in these rules or taking their chances by pursuing any available state law claim. *See* 14 C.F.R. § 250.9(b) (Pet. App. 34a-36a). The limitation on punitive damages which the Ninth Circuit discovered in this case is not mentioned in any of the disclosures which airlines must make to their passengers, a result which conflicts with the "full disclosure" policy embodied in these rules.[5]

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[5] Thus, passengers who rely on the federally mandated disclosures which must appear on every ticket and at every airline ticket counter (see 14 C.F.R. § 250.11) may be misled into foregoing a liquidated damages award which is offered on the spot because they think that they can pursue state law claims for punitive damages which the decision below has foreclosed.

CONCLUSION

For these reasons the petition should be granted.

Respectfully submitted,

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September 1991

APPENDIX A
FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM D. WEST, *Plaintiff-Appellant,* v. NORTHWEST AIRLINES, INC., *Defendant-Appellee.*	No. 89-35820 D.C. No. CV 87-63-CCL ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
July 13, 1990—Seattle, Washington

Filed September 11, 1990
Amended February 5, 1991

Before: Procter Hug, Jr., Dorothy W. Nelson and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Torts

In an amended opinion affirming in part, reversing in part and remanding a district court grant of summary judgment, the court of appeals held that while an airline passenger's state claim against an airline for punitive damages was pre-

empted by the FAA, his claim for compensatory damages for the alleged breach of the covenant of good faith and fair dealing under state law was not.

Appellant William D. West purchased a ticket to travel on Northwest Airlines, Inc. (Northwest). Northwest overbooked West's flight and refused to allow West to board the plane. West brought an action against Northwest for breach of the covenant of good faith and fair dealing under state law and for unjust discrimination under section 404(b) of the FAA, seeking both compensatory and punitive damages. The district court granted Northwest's motion for summary judgment on both claims.

[1] The court disagreed that in section 1305(a)(1) of the FAA, Congress expressly preempted all state statutes and common law rules that affect rates or services involving air travel. [2] That section only provides that no state shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier. [3] The plain meaning of "services" clearly included services provided to customers such as the boarding services at issue here. [4] In addition, the Ninth Circuit has previously held that regulation of air carrier seating policies involved regulation of services within the meaning of that section. Thus, Northwest's passenger services, including boarding, are airline services within the meaning of section 1305. [5] However, the court found that section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an effect on airline services were not preempted. [6] In this case state law simply imposed a duty on all persons entering into contracts to act with good faith and fair dealing. The fact that this duty was applicable to airlines as well as the general public did not invoke federal preemption. [7] Section 1506 of the FAA demonstrates Congress' intent not to preempt all com-

mon law remedies. Accordingly, the court found that Congress did not impliedly preempt West's state law claim for compensatory damages under the FAA. **[8]** The court disagreed with Northwest's assertion that West's claim was preempted due to a conflict with federal law. **[9]** Federal airline overbooking regulations specifically contemplated customers choosing between liquidated damages or state common law remedies. **[10]** However, any scheme that punishes the practice of airline overbooking was inconsistent with federal law. Accordingly, West's state claim for punitive damages was preempted by the FAA.

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ORDER

After review of appellee's petition for rehearing and suggestion for rehearing en banc, the petition for rehearing is granted for the purpose of amending the opinion as attached hereto.

The members of the panel that decided this case voted to otherwise deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is otherwise DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

NELSON, Circuit Judge:

Plaintiff-appellant, William D. West (West) purchased a ticket to travel on Northwest Airlines, Inc., (Northwest) from Great Falls, Montana to Arlington, Virginia. Northwest overbooked West's flight and refused to allow West to board the plane. West brought this action against Northwest for breach of the covenant of good faith and fair dealing under Montana law. The district court granted summary judgment for Northwest on the ground that West's claim was preempted by the Federal Aviation Act. We affirm in part and reverse and remand in part to the district court to determine if West has a meritorious claim for compensatory damages under Montana law.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 1986, William D. West purchased a non-refundable, non-changeable ticket to travel on Northwest from Great Falls, Montana to Arlington, Virginia. His flight was scheduled to depart Great Falls at 1:30 p.m. and to arrive in Arlington at 9:00 p.m. on October 7, 1986. West confirmed his scheduled departure with his travel agent on October 6, 1986.

Between the date of purchase and the scheduled departure date, Northwest decided to reduce the size of its aircraft from a Boeing 727, which carries 146 passengers, to a DC 9 aircraft, which carries 78 passengers. Northwest did not inform West or any of Northwest's sales agents of its decision.

When West arrived at the check-in gate, a Northwest employee informed him the flight was overbooked. Northwest attempted to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. However, only three people accepted, and West could not obtain a seat on this flight.

Northwest then offered West an alternative flight that would arrive at Dulles Airport, which is near West's destination, at 3:00 a.m. the next morning. West declined this alternative flight because of its inconvenience and rescheduled his flight to Arlington for approximately two weeks later.

West subsequently filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law and for unjust discrimination under section 404(b) of the Federal Aviation Act (FAA), seeking both compensatory and punitive damages. Northwest successfully petitioned the United States District Court to remove the case to the federal court on the basis of diversity of citizenship.

Northwest then moved for summary judgment on the grounds that the period for bringing a claim under Section 404(b), upon which West based his federal claim, had expired and that West's state claim was preempted by the FAA. On September 28, 1989, the district court granted Northwest's motion for summary judgment on both of the above grounds. West timely appealed only the issue of whether the district court erred in dismissing West's state law claim on the ground that it was preempted by the FAA.

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there existed any genuine issue of

material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

II. Federal Preemption

Northwest argues that the federal government's role in regulating the air transportation industry under the FAA preempts Montana's common law duty to deal fairly and in good faith. In examining this issue, we note that when Congress legislates in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships, there is a presumption against finding pre-emption of state law. *See California v. ARC America Corp.*, 109 S. Ct. 1661, 1665 (1989).

There are three ways in which preemption may occur. "Congress may preempt state law expressly by so stating in explicit terms on the face of the statute." *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1318 (2nd Cir. 1990) (internal quotations omitted). Second, "when Congress intends that federal law occupy a given field, state law in that field is pre-empted." *ARC America Corp.*, 109 S. Ct. at 1665. Finally, even if Congress has not occupied the field, "state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible." *Id.*

A. Explicit Preemption

[1] The district court found that Congress in the FAA expressly preempted West's state law claims. Specifically the court held that in section 1305(a)(1), "Congress intended to preempt all state statutes and common law rules which affect rates or services involving air travel." We disagree, finding that Congress did not expressly preempt West's state law claim.

[2] Section 1305(a)(1) of the FAA provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates, routes, or services* of any air carrier." 49 U.S.C. § 1305(a)(1) (App. Supp. V 1987) (emphasis added).

Appellant asserts first that section 1305 does not apply because "services" does not include airline boarding practices but is limited in meaning to a description of the types of operations which airlines offer, such as scheduled passenger service, scheduled cargo service, mail service and other specialized services. Thus, under West's reading, section 1305 would preempt state law only when the state law affected the types of services offered. We reject this interpretation.

[3] "The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used." *Hughes Air Corp. v. Public Utilities Com'n*, 644 F.2d 1334, 1337 (9th Cir. 1981); *Watt v. Alaska*, 451 U.S. 259, 265 (1981). In this case, we believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here. If Congress had intended to limit the word "services" to something other than its common usage, it could easily have used the words "types of services" rather than "services".

[4] Moreover, the Ninth Circuit has already rejected West's definition of services in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984). In *Hingson* the court held that regulation of air carrier seating policies involved regulation of services within the meaning of section 1305(a)(1). *Id.* Thus, the court did not define "services" as merely types of services such as cargo or air ambulance but defined it to include services to customers. Following *Hingson*, we find that Northwest's passenger services, including boarding, are airline services within the meaning of section 1305.

[5] However, while we agree with Northwest that "services" include boarding policies, we disagree with Northwest and the district court that "law[s] . . . relating to airline services" encompasses all state laws that affect airline services, however tangentially. This interpretation of § 1305(a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted. *See People of State of N.Y. ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F. Supp. 162 (S.D.N.Y. 1989).

Our analysis is consistent with Ninth Circuit case law. In *Hingson*, a blind person who was not permitted to sit in certain seats during a Pacific Southwest Airlines (PSA) flight brought suit against PSA. Hingson alleged intentional infliction of emotional distress and a claim arising under California Civil Code Section 54.1, which required that handicapped person be given "full and equal access" to accommodations of all airplanes. *Hingson*, 743 F.2d at 1411, 1415. The Ninth Circuit held that Hingson's claims under California Civil code Section 54.1 were preempted by section 1305(a)(1). The court reasoned that Section 54.1 was a regulation directly relating to services within the meaning of Section 1305(a)(1). *Id.* at 1415. The court, however, held that Hingson's claim for intentional infliction of emotional distress was not preempted. *Id.* This decision is consistent with our reading of section 1305(a)(1). Hingson's emotional distress claim did involve the airline's passenger services; however, the underlying law, the tort of intentional infliction of emotional distress, was not addressed exclusively to airline service. Thus, § 1305(a)(1) did not preempt.

Likewise, the court in *Air Transport Ass'n v. P.U.C.*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988),

found that preemption of 1305(a)(1) did not extend to laws that only affected airlines without being directly related to their services. In *Air Transport Ass'n,* airlines and airline trade associations challenged a California regulation prohibiting telephone customers from surreptitiously overhearing or recording conversations. The airlines wished to monitor conversations between their reservation agents and the public. *Air Transport Ass'n,* 833 F.2d at 201-02. The court stated that the California regulation was not preempted because "[t]he type of telephone operation utilized by the airlines is not peculiar to airlines," and the court could find no evidence that Congress intended to preempt state regulation of utilities when they affected airlines. *Id.* at 207.

[6] Similarly, in the instant case state law simply imposes a duty on all persons entering into contracts to act with good faith and fair dealing. The fact that this duty is applicable to airlines as well as the general public does not invoke federal preemption. We find, therefore, that West's state law claims are not expressly preempted by the FAA.

B. Implied Preemption

[7] In order to show that the FAA impliedly preempts West's claim, Northwest must show that Congress intended that federal law occupy the specific field covered by state law. *ARC America Corp.,* 109 S. Ct. at 1665. Section 1506 of the FAA, however, clearly indicates that Congress had no such intention. Section 1506 reads: "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 49 U.S.C. § 1506 (App. 1982). In force since 1938, this section was specifically retained when Congress enacted the Airline Deregulation Act of 1978 which included the preemption section 1305(a)(1). Section 1506 demonstrates Congress' intent not to preempt all common law remedies.[1] Accordingly, we find that Congress did

[1]Additionally, federal regulations specifically permit a passenger to pursue damages under available state law if they are bumped, 14 C.F.R.

not impliedly preempt West's state law claims under the FAA.

C. Conflict Preemption

[8] Finally, Northwest asserts that West's claim is preempted due to a conflict with federal law. Specifically, Northwest argues that it could not comply both with the federal regulations governing boarding and state common law. We disagree.

[9] Federal airline overbooking regulations specifically contemplate customers choosing between liquidated damages or state common law remedies. 14 C.F.R. § 250.9(b) (1990). Moreover, the Supreme Court has held that common law remedies in overbooking situations do not conflict with federal priority rules for boarding passengers and providing compensation to bumped passengers. *See Nader v. Allegheny Airlines*, 426 U.S. 290 (1976). Permitting a bumped customer to forgo liquidated damages in order to pursue a common law remedy might result in different damage awards, but it would not expose Northwest to liability more than once nor would it prevent Northwest from overbooking. Northwest has offered us no reason to believe that requiring it to conform to Montana's duty of good faith and fair dealing would prevent it from following federal regulations.

[10] However, our holding is limited to West's claim for compensatory damages and does not embrace its punitive counterpart. As stated above, federal regulations contemplate overbooking as an acceptable practice so long as passengers receive compensation. Accordingly, any scheme that *punishes* the practice would be inconsistent with applicable federal law. West's claim for punitive damages is therefore preempted by the FAA.

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§ 250.9(b) (1990); this further suggests that Congress had no intention of preempting state common law remedies.

BEST AVAILAB

CONCLUSION

For the foregoing reasons, we find that while West's state claim for punitive damages is preempted by the FAA, his claim for compensatory damages is not. In holding that this portion of West's state claim for breach of the covenant of good faith and fair dealing is not preempted, we are not deciding whether West has a valid claim. We simply hold that the FAA does not entirely preempt West's state claim. We leave it to the district court to resolve all remaining issues on remand.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

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APPENDIX B
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM D. WEST,
Plaintiff-Appellant,
v.
NORTHWEST AIRLINES, INC.,
Defendant-Appellee.

No. 89-35820
D.C. No.
CV 87-63-CCL
OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
July 13, 1990—Seattle, Washington

Filed September 11, 1990

Before: Procter Hug, Jr., Dorothy W. Nelson and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Aviation/Jurisdiction

Reversing a judgment, the court held that a state law claim against an airline for overbooking on a theory of breach of covenant of good faith and fair dealing was not preempted by the Federal Aviation Act.

Appellant William West purchased a ticket to travel on a Northwest Airlines flight. The airline, without informing him

or its sales agents in advance, reduced the size of the aircraft used for the flight. When West arrived at the check-in gate, he was told the flight was overbooked. West was not able to obtain a seat and later filed a state court action for breach of the covenant of good faith and fair dealing under state law. The case was removed to federal court, and the court granted summary judgment for Northwest. West appealed on the issue of whether the state law claim was preempted by the FAA.

[1] The district court held that Congress intended to preempt all state statutes and common law rules affecting rates or services involving air travel, under the FAA (49 § 1305(a)(1)). [2] Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services; state laws that merely have an *effect* on airline services are not preempted. [3] In this case, the state law simply imposed a duty on all persons entering into contracts to act with good faith and fair dealing. Therefore, West's state law claims were not preempted by FAA.

[4] The FAA clearly states that Congress did not intend to alter or abridge common law remedies and therefore it cannot be said that West's state law claims were impliedly preempted.

[5] Northwest also asserted that West's claim was preempted because of a conflict with federal law but [6] made no showing that conforming to the state law duty of good faith and fair dealing would prevent it from following federal regulations.

COUNSEL

Cornish F. Hitchcock, Public Citizen Litigation Group, Washington, D.C., for the plaintiff-appellant.

Jon Metropoulos, Browning, Kaleczyc, Berry & Hoven, Helena, Montana, for the defendant-appellee.

OPINION

NELSON, Circuit Judge:

Plaintiff-appellant, William D. West (West) purchased a ticket to travel on Northwest Airlines, Inc., (Northwest) from Great Falls, Montana to Arlington, Virginia. Northwest overbooked West's flight and refused to allow West to board the plane. West brought this action against Northwest for breach of the covenant of good faith and fair dealing under Montana law. The district court granted summary judgment for Northwest on the ground that West's claim was preempted by the Federal Aviation Act. We reverse and remand to the district court to determine if West has a meritorious claim under Montana law.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 1986, William D. West purchased a non-refundable, non-changeable ticket to travel on Northwest from Great Falls, Montana to Arlington, Virginia. His flight was scheduled to depart Great Falls at 1:30 p.m. and to arrive in Arlington at 9:00 p.m. on October 7, 1986. West confirmed his scheduled departure with his travel agent on October 6, 1986.

Between the date of purchase and the scheduled departure date, Northwest decided to reduce the size of its aircraft from a Boeing 727, which carries 146 passengers, to a DC 9 aircraft, which carries 78 passengers. Northwest did not inform West or any of Northwest's sales agents of its decision.

When West arrived at the check-in gate, a Northwest employee informed him the flight was overbooked. North-

west attempted to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. However, only three people accepted, and West could not obtain a seat on this flight.

Northwest then offered West an alternative flight that would arrive at Dulles Airport, which is near West's destination, at 3:00 a.m. the next morning. West declined this alternative flight because of its inconvenience and rescheduled his flight to Arlington for approximately two weeks later.

West subsequently filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law and for unjust discrimination under section 404(b) of the Federal Aviation Act. (FAA). Northwest successfully petitioned the United States District Court to remove the case to the federal court on the basis of diversity of citizenship.

Northwest then moved for summary judgment on the grounds that Section 404(b), upon which West based his federal claim, had expired and that West's state claim was preempted by the FAA. On September 28, 1989, the district court granted Northwest's motion for summary judgment on both of the above grounds. West timely appealed only the issue of whether the district court erred in dismissing West's state law claim on the ground that it was preempted by the FAA.

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there existed any genuine issue of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

II. Federal Preemption

Northwest argues that the federal government's role in regulating the air transportation industry under the FAA preempts Montana's common law duty to deal fairly and in good faith. In examining this issue, we note that when Congress legislates in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships, there is a presumption against finding pre-emption of state law. *See California v. ARC America Corp,* 109 S. Ct. 1661, 1665 (1989) (internal quotations omitted).

There are three ways in which preemption may occur. "Congress may preempt state law expressly by so stating in explicit terms on the face of the statute." *Motor Vehicle Mfrs. Ass'n v. Abrams,* 899 F.2d 1315, 1318 (2nd Cir. 1990) (internal quotations omitted). Second, "when Congress intends that federal law occupy a given field, state law in that field is pre-empted." *ARC America Corp,* 109 S. Ct. at 1665. Finally, even if Congress has not occupied the field, "state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible." *Id.*

A. Explicit Preemption

[1] The district court found that Congress in the FAA expressly preempted West's state law claims. Specifically the court held that in section 1305(a)(1), "Congress intended to preempt all state statutes and common law rules which affect rates or services involving air travel." We disagree, finding that Congress did not expressly preempt West's state law claim.

Section 1305(a)(1) of the FAA provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates,*

routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1) (App. Supp. V 1987) (emphasis added).

Appellant asserts first that section 1305 does not apply because "services" does not include airline boarding practices but is limited in meaning to a description of the types of operations which airlines offer, such as scheduled passenger service, scheduled cargo service, mail service and other specialized services. Thus, under West's reading, section 1305 would preempt state law only when the state law affected the types of services offered. We reject this interpretation.

"The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used." *Hughes Air Corp. v. Public Utilities Com'n*, 644 F.2d 1334, 1337 (9th Cir. 1981); *Watt v. Alaska*, 451 U.S. 259, 265 (1981). In this case, we believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here. If Congress had intended to limit the word "services" to something other than its common usage, it could easily have used the words "types of services" rather than "services".

Moreover, the Ninth Circuit has already rejected West's definition of services in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984). In *Hingson* the court held that regulation of air carrier seating policies involved regulation of services within the meaning of section 1305(a)(1). *Id.* Thus, the court did not define "services" as merely types of services such as cargo or air ambulance but defined it to include services to customers. Following *Hingson*, we find that Northwest's passenger services, including boarding, are airline services within the meaning of section 1305.

[2] However, while we agree with Northwest that "services" include boarding policies, we disagree with Northwest and the district court that "law[s] . . . relating to airline services"

encompasses all state laws that affect airline services, however tangentially. This interpretation of § 1305(a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted. *See People of State of N.Y. ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F. Supp. 162 (S.D.N.Y. 1989).

Our analysis is consistent with Ninth Circuit case law. In *Hingson*, a blind person who was not permitted to sit in certain seats during a Pacific Southwest Airlines (PSA) flight brought suit against PSA. Hingson alleged intentional infliction of emotional distress and a claim arising under California Civil Code Section 54.1, which required that handicapped person be given "full and equal access" to accommodations of all airplanes. *Hingson*, 743 F.2d at 1411, 1415. The Ninth Circuit held that Hingson's claims under California Civil code Section 54.1 were preempted by section 1305(a)(1). The court reasoned that Section 54.1 was a regulation directly relating to services within the meaning of Section 1305(a)(1). *Id.* at 1415. The court, however, held that Hingson's claim for intentional infliction of emotional distress was not preempted. *Id.* This decision is consistent with our reading of section 1305(a)(1). Hingson's emotional distress claim did involve the airline's passenger services; however, the underlying law, the tort of intentional infliction of emotional distress, was not addressed exclusively to airline service. Thus, § 1305(a)(1) did not preempt.

Likewise, the court in *Air Transport Ass'n v. P.U.C.*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 1988 found that preemption of 1305(a)(1) did not extend to laws that only affected airlines without being directly related to their services. In *Air Transport Ass'n*, airlines and airline

trade associations challenged a California regulation prohibiting telephone customers from surreptitiously overhearing or recording conversations. The airlines wished to monitor conversations between their reservation agents and the public. *Air Transport Ass'n,* 833 F.2d at 201-02. The court stated that the California regulation was not preempted because "[t]he type of telephone operation utilized by the airlines is not peculiar to airlines," and the court could find no evidence that Congress intended to preempt state regulation of utilities when they affected airlines. *Id.* at 207.

[3] Similarly, in the instant case state law simply imposes a duty on all persons entering into contracts to act with good faith and fair dealing. The fact that this duty is applicable to airlines as well as the general public does not invoke federal preemption. We find, therefore, that West's state law claims are not expressly preempted by the FAA.

B. Implied Preemption

[4] In order to show that the FAA impliedly preempts West's claim, Northwest must show that Congress intended that federal law occupy the specific field covered by state law. *ARC America Corp.,* 109 S. Ct. at 1665. Section 1506 of the FAA, however, clearly indicates that Congress had no such intention. Section 1506 reads: "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 49 U.S.C. § 1506 (App. 1982). In force since 1938, this section was specifically retained when Congress enacted the Airline Deregulation Act of 1978 which included the preemption section 1305(a)(1). Section 1506 demonstrates Congress' intent not to preempt all common law remedies.[1] Accordingly, we find that Congress did

[1]Additionally, federal regulations specifically permit a passenger to pursue damages under available state law if they are bumped, 14 C.F.R. § 250.9(b) (1990); this further suggestes that Congress had no intention of preempting state common law remedies.

not impliedly preempt West's state law claims under the FAA.

C. Conflict Preemption

[5] Finally, Northwest asserts that West's claim is preempted due to a conflict with federal law. Specifically, Northwest argues that it could not comply both with the federal regulations governing boarding and state common law. We disagree.

[6] Federal airline overbooking regulations specifically contemplate customers choosing between liquidated damages or state common law remedies. 14 C.F.R. § 250.9(b) (1990). Moreover, the Supreme Court has held that common law remedies in overbooking situations do not conflict with federal priority rules for boarding passengers and providing compensation to bumped passengers. *See Nader v. Allegheny Airlines*, 426 U.S. 290 (1976). Permitting a bumped customer to forgo liquidated damages in order to pursue a common law remedy might result in different damage awards, but it would not expose Northwest to liability more than once nor would it prevent Northwest from overbooking. Northwest has offered us no reason to believe that requiring it to conform to Montana's duty of good faith and fair dealing would prevent it from following federal regulations.

CONCLUSION

For the foregoing reasons, we find that West's state claim is not preempted by the FAA. In holding that West's state claim for breach of the covenant of good faith and fair dealing is not preempted, we are not deciding whether West has a valid claim. We simply hold that the FAA does not preempt West's state claim. We leave it to the district court to resolve all other issues on remand.

REVERSED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN - 4 1991

CATHY A. CATTERSON, CLERK

WILLIAM D. WEST, Plaintiff-Appellant,	)
v.	) No. 89-35820) USDC No. CV 87-63-CCL
NORTHWEST AIRLINES, INC., Defendant-Appellee.	) ORDER

Before: HUG, NELSON AND BRUNETTI.

Upon consideration of Appellant West's petition for rehearing, the court vacates the portion of our February 5, 1991 order and amended opinion which granted the appellee's petition for rehearing. The decision, as amended, stands. The petitions for rehearing are DENIED.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35820
CT/AG#: CV-87-63-CCL

MANDATE ISSUED
JUL - 5 1991

WILLIAM D. WEST

Plaintiff - Appellant

v.

FILED
JUL 10 1991
LOU ALEKSIC
By DIANNE E. MANTZ
Deputy Clerk

NORTHWEST AIRLINES, INC.

Defendant - Appellee

TRANS WORLD AIRLINES, INC.; AMERICAN AIRLINES, INC.

Amici Curiae

APPEAL FROM the United States District Court for the USDC - Helena, Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the USDC - Helena, Montana and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here or-

dered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

Filed and entered September 11, 1990, amended February 5, 1991, and amended further by Order filed June 4, 1991.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 10 1991

CATHY CATTERSON, CLERK
U.S. COURT OF APPEALS

WILLIAM D. WEST,
Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,
Defendant-Appellee.

No. 89-35820
USDC No. CV 87-63-CCL

ORDER

Before: HUG, D.W. NELSON and BRUNETTI, Circuit Judges.

The motion to recall the mandate is DENIED.

The June 4, 1991 order merely vacated that portion of the February 5, 1991 opinion which granted the petition for rehearing. The rest of the February 5, 1991 opinion stands, including the discussion on punitive damages.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

****

FILED

SEP 28 1989

LOU ALEKSICH, JR. CLERK

By Dianne M. Spooner

Deputy Clerk

WILLIAM D. WEST,

Plaintiff,

-v-

NORTHWEST AIRLINES, INC., a corporation,

Defendant.

CV 87-63-H-CCL

MEMORANDUM AND ORDER

****

This action arises out of a claim by plaintiff West that defendant Northwest Airlines allegedly subjected West to unjust discrimination, undue or unreasonable preference or disadvantage when it denied West a boarding pass on flight number 1150 in Great Falls, Montana, on October 7, 1986.

West relies upon § 404(b) of the Federal Aviation Act (hereinafter FAA) 49 U.S.C. 1374(b) to provide a federal private cause of action for unjust discrimination. Additionally, West alleges that a private state cause of action for breach is available under state law because defendant unduly or unreasonably gave preference or disadvantage in denying West a boarding pass for flight number 1150 and because the defendant did not follow its own policy in offering compensation to West when he was denied a boarding pass.

Before the court is the defendant's motion for summary judgment. The motion has been fully briefed and the parties were heard in open court September 15, 1989, at which time plaintiff

West and defendant Northwest appeared and argued through their respective counsel. The court now rules on the motion.

Summary judgment is properly granted under Rule 56(c) if the "pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." California Architectural Building Products, Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting Rule 56(c), Fed. R. Civ. P.), cert. denied, 108 S.Ct. 698 (1988). The initial burden is upon the party seeking summary judgment to inform the court of the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Once this is accomplished, the non-moving party is invested with the obligation to go beyond the pleadings and show that there is a genuine issue for trial. Id. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). "[T]o withstand a motion for summary judgment, the non-moving party must show that there are 'genuine factual issues that can only be resolved by a finder of fact because they may reasonably be resolved in favor of either party.'" Id., 106 S.Ct. at 2511.

Defendant's motion to dismiss raises two issues of law; first, that plaintiff West's denial of a boarding pass occurred on October 7, 1986, and the federal statute on which West bases his federal claim, 49 U.S.C. 1374(b), had expired January 1, 1983, making the plaintiff's federal claim non-existent, and, second, that West's state claims are preempted by 49 U.S.C. 1305(a).

In this case, the court concludes that the plaintiff cannot withstand defendant's motion for summary judgment because the plaintiff fails to establish a private cause of action under the Federal Aviation Act. The court also concludes that the plaintiff's state law claims are precluded by the preemption section of the FAA. Furthermore, there is no dispute over facts that would affect the outcome of the suit under the governing law.

FACTS

The facts considered in a light most favorable to the plaintiff

show that on September 3, 1986, West purchased a non-refundable, non-changeable ticket to travel on Northwest Airlines from Great Falls, Montana, to Washington National Airport in Arlington, Virginia, on October 7, 1986. The flight was to depart Great Falls at 1:30 p.m., and arrive Washington National at 9:00 p.m. on October 7, 1986. Between the date of purchase and the date of Mr. West's planned travel, Northwest Airlines decided to reduce the size of its aircraft from a Boeing 727-200 which carries 146 passengers to a DC 9 aircraft which carries 78 passengers. Northwest did not inform West or any of Northwest's sales agents of its decision. When West arrived at the check-in gate, a Northwest Airlines employee informed him the flight was overbooked. Subsequently, Northwest made attempts to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. Although three people accepted, there remained no room for Mr. West on flight number 1150. Northwest Airlines then offered West an alternate flight which would arrive at Dulles Airport at 3:00 a.m. West declined to accept the alternate flight because of its inconvenience and rescheduled his flight to Washington National for sometime later. Northwest Airlines gave West a copy of its "Denied Boarding Regulations" and gave him a check for $198.00, twice the purchase price of his one-way ticket. West subsequently filed his claims in state court and the defendant petitioned the United States District Court to remove the case to the federal court pursuant to 28 U.S.C. § 1332 and § 1441.

Private Right of Action under 404(b) of the Federal Aviation Act, 49 U.S.C. 1374(b).

Plaintiff West argues that the Federal Aviation Act (FAA) grants private citizens such as himself the right to enforce perceived violations by air carriers through private causes of actions.*

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*At oral argument, plaintiff West seemed to circumvent the issue of a private cause of action and argued instead that his claim was actually a state claim. According to West, it was the defendant who maintained there was a federal cause of action by forcing removal of the case to federal district court. Nevertheless, the court is compelled to respond to the claims which the plaintiff has set forth in his brief in opposition to defendant's motion for

According to West, this right is provided by 404(b) of the FAA, 49 U.S.C. 1374(b), and subsequent case law interpreting that federal statute. See Mahoney v. Air France, 474 F. Supp. 531 (S.D.N.Y., 1979), Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C.C.A., 1975), Fitzgerald v. Pan American World Airways, 229 F.2d 449, (2d Cir. 1956), Mortimer v. Delta Airlines, 302 F. Supp. 276, (N.D. Ill. 1969), and Hingson v. Pacific Southern Airlines, 743 F.2d 1408 (9th Cir. 1984).

Although the court understands some of the plaintiff's frustration with Northwest's treatment of him, the plaintiff fails to establish a federal cause of action on which the court can decide a claim. Effective January 1, 1983, the Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1705, repealed all of Section 404(b). West does not provide any legal authority or theory on how to establish his private claim when the statute on which he relies has expired. Every case to which the plaintiff points for authority was decided prior to the expiration of 404(b) except for Hingson, supra. However, in Hingson, the plaintiff's cause of action accrued in September, 1980, nearly three years before 404(b) ceased to be effective. Furthermore, the Hingson court was careful to point out that although the statute on which the plaintiff relied was in effect at the time of his claim, it had expired January 1, 1983, as a result of the Airline Deregulation Act of 1978. Id., fn. 1 at 1411. The likely purpose of footnote 1 is to prevent the use of the case as authority for claims which arise after January 1, 1983. See also, Ramirez de Arellano v. Eastern Airlines, Inc., 629 F. Supp. 189 (D. Puerto Rico 1985) ("Since the incident which gives rise to the alleged federal discrimination claim occurred on May 23, 1983, plaintiff's federal statutory action is allegedly nonexistent as a matter of law. We agree. Section 1374(b) has definitely been eliminated as of January 1,

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summary judgment. Moreover, plaintiff's amended complaint alleges that Northwest's willful overbooking violates Department of Transportation regulations and constitutes oppressive bad faith. The court construes this to mean that the plaintiff is attempting to enforce by private action regulations which have been enacted pursuant to the Federal Aviation Act.

1983.") and see Diefenthal v. C.A.B., 681 F.2d 103, (5th Cir. 1982).

Since 404(b) has expired, the court can only hypothesize how the plaintiff's claim might be reconstituted under the FAA to determine if a private cause of action can be found. One possible theory would be that since the expiration of 404(b), there may be an implied private right under the remaining § 404(a) which requires air carriers to provide "safe and adequate service."

At least one appellate court has considered this question and found that following the expiration of 404(b), 404(a) cannot be given a new interpretation to provide a private cause of action. Anderson v. U.S. Air, Inc., 818 F.2d 49 (D.C. Cir., 1987). Although Anderson involved a blind person whom the airline had denied transportation after he refused to vacate the seat next to an emergency exit, the issue presented by the claim was whether Congress intended that violations of § 404(a) could be remedied by aggrieved individuals or solely by the administrative agencies charged with enforcement of the statute. To discern whether Congress intended private citizens to enforce the FAA, the court applied the "intent test" of Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). The court found the required intent was absent from the remaining section of 404 and noted in particular that phrasing a statute in general terms rather than specifically identifying the benefitted class indicates a lack of intent. Anderson at 54. (Citing one of the factors the Supreme Court has recognized when determining intent). Comparing the remaining 404(a) to the expired 404(b), the court stated: "section 404(b) which prior to its repeal in 1983 had been interpreted to provide a private right of action, see e.g. Nader v. Allegheny Airlines, Inc., (citations omitted; emphasis added), specifically names the entities protected from 'unjust discrimination' .... Given the marked difference in phrasing between section 404(a) and 404(b), it is evident Congress was as fully capable of specifying 'especial' beneficiaries in the former as it did in the latter." Id. at 54.

Moreover, the Anderson court found the existence of an extensive and detailed scheme of administrative enforcement as evidence that Congress intended the administrative agencies, not private citizens, to enforce violations of the FAA. Id., citing In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983). This court agrees with the court's analysis in Anderson.

Plaintiff West's appropriate remedy then is to pursue his

claim through the Department of Transportation and the Federal Aviation Administration, who are the enforcers of the FAA. The absence of private remedy does not mean the airlines have a license to mistreat or to inadequately serve passengers, it only means an agency, rather than an individual, is empowered to bring suit directly against an airline. Id. at 55.

II. West's State Claims

Plaintiff West argues that even if his federal cause of action fails, the Federal Aviation Act does not preempt his state claim based upon unjust discrimination or undue or unreasonable prejudice or disadvantage. The plaintiff argues that this discrimination, prejudice, or disadvantage resulted in a breach of the defendant's duty to deal fairly and in good faith which is a common law claim under Montana law. Section 105(a)(1) of the FAA provides:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation. 49 U.S.C. § 1305(a).

The Ninth Circuit has held that by this section of the FAA, Congress intended to preempt all state statutes and common law rules which affect rates or services involving air travel. Hingson, supra, see also Air Transport Ass'n v. P.U.C. of the State of Cal., 833 F.2d 200 (9th Cir. 1987); Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 97 (2d Cir. 1986). Anderson v. U.S. Air, 818 F.2d 49 (D.C. Cir. 1987).

In addition, the Supreme Court has found that the Congress has "through the [FAA], regulated aviation extensively." Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1, 106 S.Ct. 2369, 2372, 91 L.Ed. 2d 1 (1986). Finally, where the claim is based on an implied duty of good faith and fair dealing which requires an examination of the expectations of the parties and the state imposed duties, the claim is preempted by federal law. See Allis-

Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed. 2d 206 (1982).

Therefore, for the reasons set forth herein, Defendant Northwest Airlines' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that the Final Pretrial Conference scheduled for September 29, 1989, and the trial setting for October 2, 1989, are hereby vacated.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 28 day of September, 1989.

/s/
CHARLES C. LOVELL
United States District Judge

APPENDIX G

AO 450 (Rev. 5/85) Judgment in a Civil Case

~~IN CIVIL DOCKET~~

SEP 28 1989

LOU ALEKSICH, JR., CLERK

By /s/ Deputy

United States District Court

HELENA DIVISION DISTRICT OF MONTANA

WILLIAM D. WEST,

JUDGMENT IN A CIVIL CASE

V.

NORTHWEST AIRLINES, INC.
a corporation

CASE NUMBER:
CV-87-63-H-CCL

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant Norwest Airlines' motion for summary judgment is GRANTED, and that plaintiff take nothing, that the action be dismissed on the merits.

September 28, 1989	LOU ALEKSICH, JR.
Date	Clerk
	/s/
	(By) Deputy Clerk

APPENDIX H

14 C.F.R. § 250.9 (1991) reads:

(a) Every carrier shall furnish passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space immediately after the boarding occurs, a written statement explaining the terms, conditions, and limitations of denied boarding compensation, and describing the carriers' boarding priority rules and criteria. The carriers shall also furnish the statement to any person upon request at all airport ticket selling positions which are in the charge of a person employed exclusively by the carrier, or by it jointly with another person or persons, and at all boarding locations being used by the carrier.

(b) The statement shall read as follows:

COMPENSATION FOR DENIED BOARDING

If you have been denied a reserved seat on (name of air carrier) you are probably entitled to monetary compensation. This notice explains the airline's obligation and the passenger's rights in the case of an oversold flight, in accordance with regulations of the U.S. Civil Aeronautics Board.

VOLUNTEERS AND BOARDING PRIORITIES

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his or her will until airline personnel first ask for volunteers who will give up their reservation willingly, in exchange for a payment of the airline's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily in accordance with the following boarding priority of (name of air carrier): (In this space carrier inserts its boarding priority rules or a summary thereof,

in a manner to be understandable to the average passenger.)

COMPENSATION OF INVOLUNTARY DENIED BOARDING

If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless:

(1) You have not fully complied with the airline's ticketing, check-in, and reconfirmation requirements, or you are not acceptable for transportation under the airline's usual rules and practices, or (2) you are denied boarding because the flight is canceled; or (3) you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons; or (4) you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or (5) the airline is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face values of their ticket coupons, with a $200 maximum. However, if the airline cannot arrange "alternate transportation" (see below) for the passenger, the compensation is doubled ($400 maximum). The "value" of a ticket coupon is the one-way fare for the flight shown on the coupon including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's final destination or first 4-hour stopover are used to compute the transportation.

"Alternate transportation" is air transportation (by an airline licensed by the CAB) or other transportation used by

the passenger which, at the time the arrangement is made, is planned to arrive at the passenger's next scheduled stopover (of 4 hours or longer) or final destination no later than 2 hours (for flights within U.S. points, including territories and possessions) or 4 hours (for international flights) after the passenger's originally scheduled arrival time.

METHOD OF PAYMENT

The airline must give each passenger who qualifies for denied boarding compensation a payment by cash or check for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the airline arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment shall be sent to the passenger within 24 hours. The air carrier may offer free tickets in place of the cash payment. The passenger may, however, insist on the cash payment, or refuse all compensation and bring private legal action.

PASSENGER'S OPTIONS

Acceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.